NATURAL RESOURCES INTERIM COMMITTEE MEETING
MONDAY, MAY 17, 2004
10:30 AM, GOLD ROOM
STATEHOUSE, BOISE, IDAHO

The meeting was called to order at 10:40 by Cochairman Senator Noh. Other committee members present were Senator John Andreason, Senator Don Burtenshaw, Senator Stanley Williams, Senator Clint Stennett, Cochairman Representative Dell Raybould, Representative JoAn Wood, Representative Bert Stevenson, Representative Lawerence Denney and Representative Chuck Cuddy. Adhoc members present were Senator Skip Brandt and Senator Brad Little.

Others present at the meeting included: Representative Pete Nielsen, District #22; Dwight Johnson, Department of Commerce & Labor; Gayle Batt and Norm Semanko, Idaho Water Users Association; Joe Jordan, Idaho Water Resource Board; Terry Uhling, Federal Claims Coalition; Jim Tucker and Rich Hahn, Idaho Power Company; John Simpson, Clear Springs F.C.C.; Hal Anderson, Idaho Department of Water Resources; Judy Bartlett, Idaho Farm Bureau Federation; Andrea Mihm and Patrick Sullivan, Sullivan & Reberger; Lynn Tominaga and Brenda Tominaga, Idaho Ground Water Appropriators; Kay Hardy, Thousand Springs Water Users; Gregory Kasto, Idaho Trout Co.; Judi Danielson, Northwest Power Planning Council; Winston Wiggins, Idaho Department of Lands and Steven Strack, Idaho Attorney General's Office. Legislative Services Office staff present included: Carl Bianchi, Katharine Gerrity, Ray Houston and Toni Hobbs

Senator Noh stated that the committee would be reviewing the Nez Perce term sheet and that it is very important that the public and all legislators have an opportunity to understand the agreement and all of its potential ramifications. He thanked those who participated in the negotiations that led to this agreement. **Representative Raybould** commented that this agreement is the result of very intense negotiations that have taken place over several years between the Tribe, water users, the state and federal government. He added that the agreement is going to have some issues that are adverse to what the water users would have liked but, in the long run, it seems to cover all of the bases. Now it is up to the state to look at it and come up with the requirements and legislation necessary to put the agreement into action. **Representative Raybould** continued that it is very difficult to look at the agreement during this time of severe drought but that everyone needs to remember that this is a long-term agreement, the lack of which could result in serious ramifications to the state in the future.

Mr. Michael Bogert, Governor's Office, stated that the agreement represents a

turning point for the state to be able to discuss the issues openly. A copy of the term sheet is available on the Governor's website at http://www2.state.id.us/gov/issues/srba.htm (do not type a period at the end of the address).

Mr. Bogert noted that the document has been, due to litigation, subject to a court imposed protective order over the last five years. This litigation involved the Nez Perce Tribe and other objectors to the Snake River Basin Adjudication. **Mr. Bogert** explained the reason for confidentiality as it relates to the courts rules of evidence that allow parties to confidentially speak to each other about settlement. The ability to speak freely and negotiate was an important aspect of the process which resulted in the agreement being reached.

Mr. Bogert continued that the next steps will involve the public process both in the State of Idaho and in Congress. Idaho's congressional delegation is reviewing the materials and making decisions as to what the congressional focus will be. He added that the state also has decisions to make regarding the ultimate implementation of the agreement.

Mr. Bogert said that this agreement has not come easily but, in his opinion, it protects the interests of the citizens of Idaho without conceding that any of the provisions are required under the law. The term sheet does not say that providing the 427,000 acre feet of water, that the Bureau of Reclamation has determined satisfies their endangered species obligation, is necessary as a matter of complying with the law. The term sheet also provides that Idaho's current forest practices act is sufficient under the ESA.

Mr. Bogert stated that as the agreement is discussed, the key focus is threefold:

> The agreement was reached while still protecting Idaho's sovereignty. That was one of the Governor's nonnegotiable positions. The state would negotiate and evaluate the issues by reinforcing Idaho's state water law and state sovereignty over these matters.
> The agreement gives certainty. It gives irrigators certainty that the 427,000 acre feet will remain in place for a 30 year period provided certain conditions over that time period are understood and complied with. This long-term certainty was deemed to be important.
> The term sheet also includes opportunity. The opportunity is created through creative thinking that will allow the state to enter into discussions with the Department of Interior over a cooperative agreement under Section 6 of the Endangered Species Act (ESA). **Mr. Bogert** continued that the provisions will allow the state, through federal funding, to be able to administer a forest practices act program with an ultimate aim of providing ESA incidental take protection for Idaho's timber industry and others that want to have access to private and public lands and to avoid going to court over 60 day notices and the

like. In the Salmon/Clearwater area, it will provide the opportunity to those who want to voluntarily participate, to receive incidental take protection for their water diversion practices in key anadromous fish tributary and other sensitive habitat areas of the state. Term sheet provisions provide irrigators the opportunity to have assurances under the ESA that their irrigation practices and water rights can be appropriately diverted and exercised under Idaho's state law and still receive protection under federal law.

Mr. Bogert concluded that the key, as we move forward, is to evaluate the agreement with an aim to ultimately provide what is best in terms of public policy to the citizens impacted.

Mr. Norm Semanko, Idaho Water Users Association, spoke to the committee regarding the Upper Snake River component of the agreement. He explained that Roger Ling and Terry Uhling are the representatives for the Upper Valley (above Milner) and Lower Valley (Boise/Payette Basins respectively). Mr. Ling and Mr. Uhling took part in the negotiations for the agreement for the water users in the State of Idaho above Hells Canyon.

Mr. Semanko stated that the water users have been involved in the process from the beginning. This includes attempts that were made right after the Nez Perce claims were filed to try to negotiate a settlement. A very coherent group of water users, known as the Federal Claims Coalition, have been guiding their participation in this process. Irrigators have been the core of the group which was formed by the Committee of Nine coming together with representatives of Water District 63 and 65. The group also includes the North Snake Ground Water District and industrial water users such as JR Simplot Company.

Mr. Semanko noted that the existing biological opinion on the Upper Snake River expires March 31, 2005 with regard to ESA listed salmon and steelhead. A new biological opinion is needed and the term sheet provides a basis for that to give legal ESA coverage to federal projects. The term sheet will also aid in the development of a new biological opinion with the US Fish and Wildlife Service that is needed for Bull Trout and other species that expires at the end of 2004.

The biological opinion will provide incidental take coverage for federal actions and it also attempts to cover private depletionary effects above Hells Canyon as they relate to both anadromous fish and to resident species. **Mr. Semanko** clarified that the biological opinion only covers private parties above Hells Canyon and that in referring to the Upper Snake, he was referring to the Snake River and its tributaries above Hells Canyon, primarily the Snake River, the Boise River and the Payette River. In response to a question from **Senator Noh, Mr. Semanko** clarified that the wording of the agreement says "depletionary effects of diversions above Hells Canyon to the extent they affect listed anadromous fish." **Mr. Semanko** went on to note that there is no

admission in the document that anything done above Hells Canyon actually impacts the species. To the extent that may happen, the document provides the basis for an incidental take permit to protect those people from claims under the ESA, third party claims notwithstanding. The term sheet makes it very clear that the biological opinion for the Upper Snake projects will be separate and distinct from the federal Columbia River power system biological opinion. This is very important because in the past, those Columbia River projects have been deemed to jeopardize a species while the Upper Snake projects have not and it is important to keep that distinction. Idaho has not been included in the downstream biological opinion and the provisions would preserve that.

Mr. Semanko noted that the term sheet sets forth the flow contribution from the Upper Snake above the Hells Canyon complex and that the contribution is limited to what is in the term sheet. The term sheet provides that the minimums of the Swan Falls Agreement are to be decreed in the Snake River Basin Adjudication. These minimums will be held by the Idaho Water Resource Board, they will not be federal reserve water rights.

Mr. Semanko continued that the local rental pool procedures are to apply to the flow augmentation program. **Mr. Semanko** clarified that in the water bank approved local rental pool procedures there is provision for ag preference and last to fill. Ag preference is basically the caveat that when water gets put into the local rental pool, other space holders get first chance at it when that water is available to be rented. This applies to all irrigator contracted space in all reservoirs. The term sheet also states that this applies to uncontracted space but for the 30 year term of the agreement, the irrigators will waive the application of ag preference as to that uncontracted space. Last to fill would still apply and rental pool procedures would have to be followed.

Representative Raybould added that this would also apply to any powerhead that might be diverted. **Mr. Semanko** agreed that there are additional constrictions on powerhead water, i.e., water in the reservoir that helps generate power. Powerhead water can only be used for flow augmentation out of Palisades and Anderson Ranch Dams and only when it is needed to firm up the 427,000 acre feet requirement. It cannot be used to go over the 427,000, it cannot interfere with minimum conservation pools that have been set or may be set in the future, it is the last of the last space to refill if it is sent downstream, it must be done in compliance with state law and it cannot interfere with the operating levels for diverters out of the reservoirs or pools. **Mr. Semanko** noted that there is also a provision that powerhead diversions cannot cause any impact to power rates or reserve power that are guaranteed for the projects. This is the result of an ongoing, fourteen year, dispute with the Bureau of Reclamation about when and how that water can be used. The last year powerhead water was used to firm up the 427,000 acre feet was in 1994. **Senator Burtenshaw** clarified that this means if the 427,000 acre feet is not available during a certain year, the state is not required to furnish it. **Mr. Semanko** said that was correct.

According to **Mr. Semanko,** the next part of the agreement states very clearly, that with regard to the providing of the flow augmentation from the Upper Snake, no guaranty can be provided that any particular amount of water will be provided in any particular water year. The Bureau of Reclamation and NOAA Fisheries and other parties involved, know that with a willing seller set up, there is no guaranty that 427,000 acre feet will be available every year. With drought, there is no guaranty either. The agreement increases the likelihood that 427,000 acre feet will be achieved. This is due to the fact that powerhead water can be used. Another provision in the agreement allows the acquisition of up to 60,000 acre feet of the consumptive use portion of water rights between Milner and Swan Falls. These are natural flow, high lift water rights, some of which have already been rented by the Bureau of Reclamation. In this case, those rights could either be permanently acquired or, more likely, rented by the Bureau of Reclamation. The concept is that 60,000 acre feet removes some of the tension on the Upper Snake reservoirs to meet that 427,000. In a really good water year, that 60,000 could be used to raise the 427,000 to 487,000 acre feet. In most years, the 60,000 will be used to firm up the 427,000.

Senator Stennett asked how they arrived at 60,000 acre feet. **Mr. Strong** said that 60,000 acre feet was the limitation imposed to protect local economies. There was a concern that if the land was to go out of production, it would impact local infrastructure in terms of tax base and so on. There is also a proposal in the term sheet for a $2 million mitigation fund to help offset any impacts. Where the water comes from will be determined during the review phase of this term sheet. There will probably be additional discussions on how to coordinate this. **Representative Stevenson** asked whether the 60,000 acre feet will be held by the federal government or by the state water board. **Mr. Strong** stated that the intent is that the federal government would acquire that water by renting it through the water bank. The only way the water can be used for in-stream flow purposes is through the Board's water bank and will be subject to the limitations of other state law. **Representative Raybould** commented that legislation may be required to adjust the time frame on water rentals from 20 years to 30 years to meet the terms of the agreement. Also, the 60,000 acre feet requirement will require legislative approval.

Senator Burtenshaw asked whether the ag preference water or any water from the water bank will have the same fees as are established by the water bank or will bidding take place. **Mr. Semanko** said that the price is set in the term sheet for rental of stored water over the life of the term sheet. It does not fix a price for the acquisition or rental of the natural flow water. This has been left to negotiation between the Bureau of Reclamation and the private water right holder. This is an important distinction because most people that put water in the rental pool are doing so because they have decided they can live without that water and have enough other water to still produce a crop. When a natural flow water is right is leased or sold, that requires a drying up of land. It is not surplus water and so the price will obviously be different. **Representative Raybould** added that the price on water going downstream also covers the risk involved in renting that water because anything that goes downstream past Milner from Water

District 1 is last to fill. A person leasing his water out of storage this year has a last to fill risk for the next season that has to be taken into consideration. Water used above Milner for ag purposes has no last to fill rule.

Senator Williams asked whether there is a priority on who is allowed to rent the water first. **Mr. Semanko** said that was not set forth in the term sheet.

Senator Stennett asked if someone could be shut out of operation if the majority of the shareholders in a project decide to put their water in the rental pool. **Mr. Semanko** answered that this concept has been discussed but the assumption has been that if an irrigation district or canal company decides to take acres out of production, that would be decided at a board meeting and the majority would rule.

Mr. Semanko continued that the term sheet includes a provision that says the United States will make uncontracted water available to irrigators in at least two different instances. The first is that during a very dry year, 30,000 acre feet can be made available from uncontracted space separate from the uncontracted space the Bureau of Reclamation uses for flow augmentation. **Mr. Semanko** emphasized that without this agreement, this water would never be made available.

The other provision for uncontracted water says that the United States shall make its Upper Snake Basin uncontracted space available to irrigation delivery ends. This can be 23,000 acre feet above Milner, it can be part of the 95,000 acre feet in the Payette or the minimal amount in the Boise if the United States or irrigation delivery entities obtain the rights to an equivalent amount of replacement water from sub-basins within the Upper Snake River. This willing seller concept was a very important part of the agreement.

Mr. Semanko stated that the agreement also makes it clear that the water for flow augmentation is to be used in a way that does not violate applicable water quality rules of the state, does not cause jeopardy to other species in the state and does not result in significant adverse impacts to recreational uses.

The term of the agreement is 30 years. If either the biological assessment for the Upper Snake projects or the biological opinion issued by NOAA Fisheries does not comport with the agreement, the deal could be terminated at the option of either the water users or the state.

In response to a question from **Senator Stennett, Mr. Semanko** stated that the prices set in the agreement are for flow augmentation water. The amount paid for mitigation water is not directly tied to the flow augmentation price.

Mr. Semanko noted that the agreement contains ESA and Clean Water Act assurances. The goals of the Water Users Association were to make sure the Nez

Perce claims were resolved in a way that did not adversely impact water users and that water rights will not be lost due to noncompliance with the ESA or the Clean Water Act.

Mr. Terry Uhling, commented that the agreement took an enormous amount of work. He acknowledged the water users and the courage they had to sit at the table and work through the issues to arrive at this document.

Senator Noh asked how the litigation in Oregon federal court will affect this agreement. **Mr. Strong** stated that since the current biological opinion will expire at the end of 2004 and Idaho's irrigation season ends in September or October, the state believes that the Oregon litigation will be moot. By the time any decision is reached by the court, the irrigation season will be ended and the state will be on to a new biological opinion. From a litigation perspective, the state believes that a stay of that proceeding by the Oregon district court would be the most appropriate course of action. This would allow Idaho to move forward with a new biological opinion.

In response to a question from **Senator Noh, Mr. Strong** said that the term sheet requires three separate biological opinions including one for the Upper Snake River component, one for the forest practices program in the Salmon/Clearwater component, and one for the state habitat component. **Mr. Strong** is confident that the issues will be thoroughly reviewed and that litigation will not occur.

Representative Raybould asked what happens to the rest of the agreement if one section of this agreement falls through. **Mr. Strong** said that the agreement was designed so that all pieces would go together and that by March 31, 2005 the agreement would become final. By that time, the issuance of an acceptable biological opinion in the Upper Snake River project must take place, a Section 6 agreement must be drafted on the forest practices program as well as congressional and state legislation with tribal approval regarding the court decrees. Once these steps occur, if any of the components fail, each component stands separately apart. **Senator Noh** asked if litigation were to occur on something relating to the agreement, would the parties to the agreement come together to defend an action that could bring down the agreement, including the United States and the tribes. **Mr. Bogert** said that was correct. He continued that the Governor was very interested in a comprehensive approach to a variety of the state's ESA and water issues through this agreement. The agreement was structured such that if pieces of it are not able to be delivered by March 2005, each piece will be able to stand on its own. **Mr. Bogert** emphasized that there is a lot of glue that keeps the funding mechanism in place through this structure that contemplates a complete broader deal. The agreement is also poised such that the Tribe, as part of a litigation process, has enough benefit that they can waive their claims through the Snake River Basin Adjudication process. In other words, while there is an agreement in principle, there are several implementation pieces that need to be in place by March 2005 so the Tribe can waive their claims and the judicial process will be complete.

Mr. Uhling added that if a species was delisted or a change in any necessity for this water, the agreement would no longer require the utilization of Idaho's precious water resource for flow augmentation.

Mr. Bogert said that there has been agreement that the state will receive ESA assurances through voluntary decisions made in the framework of this agreement. The term sheet also provides that all parties agree that no offers or compromises made in the course of discussions and the agreement shall be construed as admissions against interest or to be used in any legal proceeding and nothing in the agreement shall be read as an admission or determination by the parties that any of the actions anticipated by the agreement are necessarily required under the ESA.

In response to a question from **Senator Little, Mr. Bogert** stated that legislation that has been discussed by the parties contemplates that Congress will confirm and ratify the agreement. **Mr. Strong** clarified that provisions relating to admissions against interest are in effect today but the agreement itself will not become final without congressional approval. **Mr. Bogert** said that the agreement shall become effective upon several contingencies that include acts of the state legislature and acts of Congress. **Representative Raybould** added that state legislation will have to be contingent upon the agreement being ratified and enforced.

The committee recessed for lunch.

After lunch **Mr. Strong** responded to a question that had been asked earlier regarding what the pricing structure means in terms of conjunctive management and some other long-term issues. He stated that this is one of the biggest policy questions that exist in the Upper Snake River component. He added that it is apparent that the Bureau of Reclamation will not be able to cooperate with the state in terms of developing an active recharge program or with making water available absent its ability to meet its obligations under the ESA. In the past, this has been the holy grail. The 427,000 acre feet had to be provided in order for the Bureau of Reclamation to be able to move forward. The agreement puts a mechanism in place to address the 427,000 and to provide greater cooperation from the Bureau of Reclamation with regard to conjunctive management issues. The down side is the commitment of a certain amount of water including powerhead water, Upper Snake River water and natural flow water which means that water will not be available to meet conjunctive management. Many of the water users that were involved in the mediation process were surface water users or storage space holders. There were some ground water users involved but this is an area that will need to be worked through with that community.

Mr. Strong noted that the term sheet represents an effort by a small but representative group of people that have put together a potential settlement option and now the education process begins. The public needs the opportunity to review, understand and evaluate the term sheet and how it interacts with other state issues. A policy decision

will need to be made to determine whether the provisions of the term sheet are a better alternative than the litigation that has been ongoing. This needs to be decided by March 31, 2005.

Mr. Strong moved on to discuss the Nez Perce component and the Salmon/Clearwater component of the agreement. He recalled that in early discussions, the state was asked by Idaho Power and the water users to participate in the mediation process. In doing so, some basic ground rules or principles were established that the state felt were necessary to reach settlement. These principles included:

> Preservation of state sovereignty over water resources within the state.
> The state would not enter into an agreement that would affect an individual's water right without their consent.
> The state would not recognize a federal reserve water in-stream flow water right for the Tribe.
> The state would require an agreement that was comprehensive and addressed all of the issues of the state.

One concern was that the state did not want to be in the position of resolving tribal claims and then have ESA issues to deal with or to solve tribal claims while shifting the burden elsewhere.

Mr. Strong continued that the Nez Perce Tribe's concern was the ability to meet tribal treaty needs. This put the state and the Tribe in immediate conflict over the federal reserve water right doctrine. The resolution set forth in the term sheet provides that the state has agreed to recognize a federal reserved water right for the Tribe's consumptive use needs but not for in-stream flows. The consumptive use right allows for 50,000 acre feet of water carrying a priority date of 1855. The water will be primarily from the Clearwater River, not from tributary streams, so it should not affect the flow going past Lewiston and therefore, should not have any impact on existing rights on the main Clearwater. There is a recognition that as this moves forward, if there are unappropriated waters in some tributary streams within the area of tribal trust lands, a reserve water right could be recognized for consumptive use needs. This right would be subordinate to all existing uses on those streams.

According to **Mr. Strong,** the agreement establishes for the tribe a $50 million multiple use Water and Fisheries Resource Trust Fund. This is basically a negotiated term between the United States and the Tribe and is not something the state or private water users have any say in. It is a reflection of the Tribe's claims under its treaty against the United States for failure to protect what the Tribe believes are its water rights. This is a traditional part of any Indian water settlement. This trust fund is for use by the Tribe in acquiring land and water rights.

Senator Noh asked if there are any parameters on where and when the land or water

may be purchased. **Mr. Strong** answered that those limits will be developed as things move forward. The first limitation is that there can be no per capita payments. This means that the money cannot be doled out to individual Tribe members, it has to be used for the benefit of the Tribe as a whole. The intent is to primarily use this money for fisheries management purposes and it does make reference to land and water rights acquisitions in and around the reservation. **Mr. Strong** encouraged that these questions be posed to the Tribe as this process progresses.

Mr. Strong stated that the agreement also includes a provision that deals with a Memorandum of Agreement between the Tribe, the Corp of Engineers, National Marine Fisheries Service, Bonneville Power Administration and the State of Idaho. The Memorandum of Agreement involves 200,000 acre feet out of Dworshak Reservoir and it is not a water right. The intent is to enter into this Memorandum of Agreement to integrate the integrated rule curve that has been developed by the tribe in consultation with the state and other parties. That integrated rule curve governs the operation of Dworshak Reservoir. From the state and tribal perspective, the plan is to move the flow augmentation that occurs out of Dworshak back to later summer months in order to protect recreational based economies and resident fisheries in the Clearwater River. From the local perspective, there should be some substantial benefits. **Representative Cuddy** asked whether the 200,000 acre feet is a negotiable product as far as assets are involved. **Mr. Strong** said that was correct. It will not be a transfer of a water right or any assets of the project itself. It deals with the operation of the facility. He added that this plan is to maintain the current flow augmentation, not to increase it. **Mr. Bogert** stated that most flows in August and September have been traditionally subject to water calls from consulting and fish managers. It is the intent of this agreement to take a 200,000 acre feet block that would normally be subject to that type of management and negotiate a contract by which this water would be used. In response to another question from **Representative Cuddy, Mr. Bogert** said that talking about expanding the time the water is drawn could be an item of discussion as the process moves forward. **Representative Cuddy** said he would agree with the concept if the date in which they start drawing the water could be moved back. **Mr. Strong** explained that if there is 1 million acre feet of water behind Dworshak, the Memorandum of Agreement reduces that to 800,000 acre feet. The intent is to reduce the amount of arbitrary decision making that has been occurring regarding those releases and give the state and the Tribe a greater say in how that occurs.

The next provision in the agreement provides a $23 million fund for domestic water supply and sewage systems for tribal dependant communities. As many people are aware, some of the water in the Lapwai area is not of drinkable water quality standards.

Mr. Strong noted that another provision provides for the transfer of management of the Kooskia hatchery to the Tribe. This has been discussed extensively with the Department of Fish and Game. Standards will need to be worked out to make sure that conflicts are not created between fishery management objectives of the state and the

Tribe.

As part of the settlement, the United States worked out an agreement in which the Tribe could receive up to $7 million in value to purchase BLM lands within the 1863 boundaries. **Mr. Strong** cautioned the use of the word "boundaries" because there is a difference of opinion between the state and the Tribe as to whether those boundaries still exist. But as part of the agreement, within that area, the Tribe could select from 11,000 acres of BLM lands excluding corridor lands along the Clearwater River. The lands primarily being considered are lands that border tribal trust lands. Appraisals are being performed on those lands and, due to timber value of some of that land, it is likely the land available will be between 4,000 and 5,000 acres. In many instances the Tribe will be looking at land that is contiguous to existing tribal land. The Tribe has expressed its willingness to continue to recognize existing leasehold interests on those lands and to provide continued public access to those lands. One outstanding issue is payment in lieu of taxes (PILT) that local counties get from federal lands. Since this is a trust, that would be affected. A reimbursement from the federal government for the loss of the PILT has been requested and there are plans to work with our congressional delegation to get some additional money to help offset that loss.

Mr. Strong noted that the next provision calls for a one-time payment of $10.1 million as compensation to the Tribe for lost rental values from water that was claimed in the Payette River system as part of the adjudication.

Mr. Strong explained that under the Tribe's reservation, there were springs and fountains that were reserved in aboriginal territory in the 1855 treaty. Those claims were made in the adjudication and the resolution to that is that the claims on federal lands would go forward. The Tribe would relinquish any claims on state and private lands totaling about 1,500 to 1,600 claims.

Mr. Bogert commented that an important component of this agreement is a grandfathering of the existing BLM and mineral leases and other contractual arrangements that already exist. Part of the discussions with the Tribe, in terms of the identified lands, will be that the existing contractual arrangements between the federal government and the public land lessees will be continued. The Tribe is aware of this fact and understands it.

Mr. Strong moved on to the Salmon/Clearwater component of the agreement. The basic principle that the state will not recognize a federal reserved in-stream flow water right is essential to this component. The component was arrived at by agreeing that the state, pursuant to state law processes, would agree to establish certain in-stream flows on tribal priority streams. A list of these streams is available in the appendix of the agreement, a copy of which is on file with the Legislative Services Office. Due to the fact that much of the area is undeveloped and has very little water conflict, when establishing in-stream flows the following ideas were considered:

That the in-stream flows would not injure existing water right holders. That means the in-stream flows created would carry a priority date as of the date of the agreement.
The state would retain its right to unilaterally change the in-stream flows once the agreement is in place. Before changing those in-stream flows, the state will consult with Tribe.
Future domestic, commercial, municipal and industrial uses (DCMI) must be protected. Any of these in-stream flows will not impair these DCMI uses.
Future agriculture development is protected. A formula for how those in-stream flows will be calculated is included in Appendix I of the agreement.

In the context of the in-stream flow program, **Mr. Strong** explained that there has been an adverse decision from the Idaho Supreme Court with regard to the Wild and Scenic Rivers. This includes the Selway, Lochsa, Middle Fork of the Clearwater, Rapid River, Main Salmon and the Middle Fork of the Salmon. The Idaho Supreme Court said that a federal reserve water right exists for in-stream flows on these rivers and the state is in the process of negotiating the quantification of those claims. This agreement says that as to those main tributary streams, the quantification of that federal reserve water right is sufficient to satisfy the tribal needs. No new in-steams flows will be established other than what the federal reserve water rights is determined to be.

The state already has existing in-stream flows on the mainstream Clearwater and the mainstream Salmon, the Lemhi and the Pahsimeroi that will be maintained as presently quantified. The Tribe had to accept these as being sufficient for meeting the tribal priority list. This is an accepted term in the term sheet.

Mr. Strong continued that in the Lemhi and Pahsimeroi, development of a Section 6 agreement is being worked on that would be implemented by the state to use a trust fund through a market based mechanism to try to improve habitat in those basins.

Representative Wood asked why wilderness and federal reserve water rights are mentioned in the agreement. **Mr. Strong** stated that in terms of wilderness, the terminology is used in the agreement only to identify the land classification, not to create a wilderness reserve water right. The agreement says that water rights under state law will be established in those wilderness areas held by the Idaho Water Resource Board.

In response to another question from **Representative Wood, Mr. Strong** explained that in its treaty, the Tribe retained the right to hunt and fish on all usual and accustomed fishing areas that extend throughout its aboriginal territory. The Tribe has an interest in maintaining the fisheries within those areas. This does not impact agreements already in existence. It will help bring some money to implement solutions to some other issues.

Representative Wood asked why people are putting their water rights up as collateral

for lawsuits they are involved in relating to 60 day notices. **Mr. Strong** said the agreement has nothing to do with that issue. **Mr. Bogert** explained that if the water rights are put up as collateral to defend lawsuits, that is a financial decision irrigators have made. On the other hand, he said that this agreement may be able to achieve incidental take coverage for those irrigators that choose to opt in and have the federal government pay part of the $38 million to develop ESA assurance and protections.

Mr. Strong continued that the water users desire to ensure that the ESA and water right claims for the Upper Snake were resolved simultaneously was very important. If the state had settled with the Nez Perce Tribe without solving the ESA issues, the door would have been left open for another party to come back and ask for more. Comprehensive coverage for these activities was an important part of this agreement.

Mr. Strong noted that there is a distinction between the Salmon/Clearwater and the Upper Snake given the operation of the federal projects on the Upper Snake River which are subject to Section 7 of the ESA. Section 7 requires that an agency, in the operation of the project, go through a consultation under the ESA and get the blessing of the U.S. Fish and Wildlife Service and NOAA Fisheries on both actions. This required the Upper Snake people to do a biological opinion and resolve the tribal claims. The Salmon/Clearwater does not have a federal project so those landholders' only obligation under the ESA is to avoid a take of the species under Section 9 of the ESA. Section 9 states that if an activity occurs that harms or kills a listed species, the party can be subject to criminal and civil liability. This has been happening in the basin with third party lawsuits and threats from agencies to local landowners saying that certain activities are causing harm to listed species or habitat.

The Section 6 program is intended, through a voluntary mechanism, to provide an opportunity for those landowners who want coverage to enroll, to work out an agreement and to get federal money to work out those agreements. In doing so, these landowners will get incidental take coverage under Section 10 of the ESA. Incidental take coverage means that, even though a party is engaged in an activity that may harm or kill a listed species, because of approval from the agency of the operation, the party will not be subject to that criminal or civil liability. The state would implement a Section 6 program and landowners could enroll in that program. To the extent the participating landowners agree to the terms and conditions of the program, they would then be free from the threat of lawsuits from federal agencies and third parties.

Mr. Strong said the forestry interests were concerned that if a water rights settlement was worked out it would put an unfair burden on them to make up the difference in terms of what is necessary to avoid jeopardy of a species. The forest interests offered to negotiate a voluntary program in which the members can enroll to get incidental take coverage. At the same time, the state was looking at this issue and decided to look at such a program. The forestry program focuses on providing additional protections within the riparian zones similar to the Plum Creek Native Fish Habitat Conservation

Plan that has been found legally sufficient by the U.S. Fish and Wildlife Service and NOAA Fisheries.

The more difficult question is what this means to the local landowners for water diversion. This is the most undeveloped part of the term sheet due to the fact that the state intends to work with the local landowners to reach agreement on those measures. Each area or basin has different needs so they have to be dealt with separately.

Mr. Strong emphasized that the state is not doing a habitat conservation plan, it is doing a Section 6 program. A Section 6 program under the ESA allows delegation of authority to a state to implement aspects of the ESA. This would be a state based program in which the state would work with local landowners to put together the measures that are thought to be appropriate and acceptable to local communities and ask that these measures be approved by the United States. This agreement would be between the State of Idaho and the United States. **Mr. Strong** said he would expect some input from the tribes as to what they want, but the final decision lies with the state and the United States.

Senator Stennett asked why the Salmon/Clearwater component includes reference to the local public interest. It was his understanding that the current statute does not contain any mention of recreation or aesthetic beauty as it relates to water. **Mr. Strong** responded that this reference is included to provide confirmation that, although those uses are being subordinated, state law will continue to be applied as it exists. **Senator Stennent** said it was his understanding that recreation has been stricken from the existing statute. **Mr. Strong** clarified that the provision means there would be compliance with state law. Debates occurred over local public interest and how broadly it is defined. Instead of excluding those values, the agreement limits how they will be considered. This language has been negotiated over five years and the intent is that existing state law will be followed.

Mr. Strong explained that the statute will need to be changed to permit the Idaho Water Resource Board to protect water from diversion to satisfy such in-stream flows. In terms of regulation, the mechanisms are already in place. To the extent that an in-stream flow is established, it takes its position in priority with all other water rights.

On the other hand, in the water short basins where there is not sufficient water available to satisfy the in-stream flow and water needs to be rented to meet the in-stream flow, state law will need to be changed. A water bank will probably be created, similar to the Lemhi, to satisfy the in-stream flow in a way that it is protected through those areas.

Senator Burtenshaw said that in the Lemhi agreement an in-stream flow was agreed upon that everyone knew did not exist. This was planned to be met by renting water from the water bank that was created. He asked where does that leave the region if there is not water available to do this. **Mr. Strong** explained that if flow is not achieved,

incidental take coverage would be lost for that year. The state has worked out an agreement with local landowners not to divert in order to keep a sufficient flow in the stream to avoid incidental take through a voluntary based mechanism. The choice is either to get the incidental take coverage and find a market based mechanism to make it work or face the threat of lawsuits. This is a choice local landowners will have to make.

Senator Burtenshaw said that as he sees this, since the people in that area are putting up their water rights to prevent lawsuits or incidental take charges, and the in-stream flows are not met, the government is actually taking away water rights. **Mr. Strong** emphasized that no water rights will be taken away under this agreement. If there is no agreement, putting up your water rights as collateral to pay for litigation is a choice landowners must make. This agreement gives people an option.

Mr. Bogert stated that the agreement contains a disclaimer that reads "...nothing in this agreement shall be read as an admission or determination by the parties that any of the actions anticipated by this agreement are necessarily required under the Endangered Species Act." In addition, the agreement provides that "(N)othing in this document shall be interpreted as suggesting that the FPA (Forest Practices Act) standards as they presently exist are insufficient to avoid take of listed species." (Parenthetical added)

The agreement continues by providing that "(B)y entering into this Agreement, neither the State of Idaho nor the private parties to this component concede that the present FPA standards are insufficient to avoid take of listed species."

(See pages 27 and 16 of the Mediators Term Sheet on file with the Legislative Services Office or located at http://www2.state.id.us/gov/issues/srba.htm.)

Mr. Bogert said that these statements are very important in terms of what the Governor and the state ultimately determined were bedrock negotiating principles.

Representative Cuddy said that in his view this agreement does not give protection against a third party suing over the Clean Water Act. **Mr. Strong** explained that this part of the Salmon/Clearwater component was written much like the Upper Snake component. The Clean Water Act is very difficult to corral. It is hoped that this agreement provides some assurances against actions under the Clean Water Act. If ESA standards and tribal claims are met, the state believes, especially through the Section 6 process, that there should also be assurance that the Clean Water Act is being met.

Representative Cuddy stated that with the exception of the wild and scenic rivers, this leaves the water rights under the laws of the State of Idaho that were granted when the state achieved sovereignty. **Mr. Strong** agreed.

In response to a question from **Senator Little, Mr. Strong** stated that the benefit of a Section 6 program over a habitat conservation plan (HCP) is that Section 6 levels the playing field. A Section 6 is between the state and the federal government while an HCP is between the federal government and an individual.
He added that it is impossible to get complete protection from the ESA. The best thing to do is to design a program that minimizes the opportunity for regulatory creep. **Mr. Strong** continued that it is uncertain who will be in charge of shutting off water rights. There are a number of lawsuits that hold the state as the liable party. The threat of lawsuits will exist whether or not this agreement is put in place. It just reduces the liability. This is a risk assessment issue. It needs to be decided if a program can be administered that is consistent with the fundamental objectives.

Senator Noh asked for the time frame involved in setting up the Section 6 Agreement. **Mr. Strong** explained that this term sheet is set up such that the Salmon/Clearwater component has to have the tribal priority in-stream flows in place by March 31,2005. It is intended to have the Section 6 Agreement for the Forest Practices drafted and ready to go public by March 31, 2005,

Mr. Strong clarified that this agreement is about a $193 million federal commitment but under the Section 6 agreement the state has an obligation of a 25% in-kind match for that program. The match can be services provided as well as money. He stated that this will be an additional burden on state agencies and will probably require additional full-time employees. **Mr. Bogert** added that the state is committed to a contribution of a value of no less than 33% of the contribution of the United States.

In response to a question from **Senator Noh, Mr. Strong** stated that a decision needs to be made regarding how to handle the in-stream flows. In his opinion, looking at the in-stream flows from a legislative perspective rather than through public hearings etc., some streams will require a public process due to certain issues.

Mr. Strong explained that there was some disagreement with the Tribe regarding administration of the Section 6 trust fund of $38 million. Thirteen million dollars of this fund could be used by the Tribe within the Salmon/Clearwater basins to address habitat measures. The other $25 million would be available to the state to implement and agree upon Section 6 programs with the federal services. **Mr. Strong** expects that these moneys will largely be driven by the enrollment process and where the most need exists. The Lemhi and Pahsimeroi are known to be high priority areas. There are also some areas in and around the reservation that probably need specific attention. He advised that this is one area where the state had a substantial disagreement with the United States as to whether that $25 million fund would be sufficient. The state has reserved the right to talk to our congressional delegation to try to find additional money in that area. **Mr. Bogert** added that the actual make up of the infrastructure of this funding portion of the agreement will be parts of a discussion and negotiation that is yet to be determined.

Mr. Strong stated that there will be areas of the agreement that people strongly agree with and areas they disagree with. Those issues will need to be worked through and a decision will have to be made to determine whether the benefits outweigh the detriments. **Senator Noh** added that other tribes need to be convinced that this agreement is the best solution. **Mr. Strong** said also that Washington, Oregon and Montana will be most interested in the Upper Snake River component of the agreement. There is much debate concerning whether 427,000 acre feet is the correct amount of water. The Yakima Tribe, Warm Springs Tribe and the Umatilla Tribe will all be very interested in the agreement and what kind of precedent it might create vis-a-vis any claims those tribes might have. To the extent that this agreement is approved, it precludes the Tribe from making any demands for water outside of Idaho. Language is also included in the agreement that says by Idaho coming to the table first, the United States has to look at other parties and to downstream contributions before reopening the biological opinion. It is important to keep in mind when entering into these agreements, the agreements exist only as long as the parties involved are willing to implement them. If there is a fundamental change in the agreement, there are ways for the parties to withdraw regarding the ESA portion.

According to **Mr. Strong,** however, once this agreement is blessed by Congress, the state, the Tribe and the court, that will be the final resolution for time in eternity for all of the federal reserve water right claims of the Tribe. Those will not come back regardless of what happens to the ESA.

Senator Noh asked how this agreement affects the politics of removing the dams. **Mr. Bogert** said that if the contours of the agreement satisfy the ESA, Bureau of Reclamation and water users issues, the long-term viability of the Port of Lewiston should exist into the foreseeable future and the debate about removing the dams should dissipate.

Senator Andreason asked if these negotiations with the Nez Perce Tribe will set any precedents for any future negotiations with other tribes. **Mr. Strong** said that, as a practical matter, there is no precedent between one treaty and another. Although there are similar provisions such as the Stevens Treaty, each has a unique legislative history. **Senator Andreason** clarified that the agreements made with the Nez Perce will not put other tribes in a position to say they deserve the same agreement the Nez Perce received. **Mr. Strong** said that was correct.

In response to a question from **Representative Stevenson, Mr. Strong** explained that the state has already entered into the Fort Hall agreement resolving the Shoshone-Bannock Tribe's claims. The Shoshone Paiute Tribal claim is the only other existing claim and these negotiations should be much simpler than the Nez Perce were.

Representative Wood asked how the unlikely possibility of the dams being removed would affect the agreement. **Mr. Strong** stated that if the dams were to be removed,

there is a reopener clause that would allow the state to withdraw from the agreement. He also clarified that if the measures of the agreement are no longer necessary for ESA purposes, the state is free to withdraw.

Mr. Strong commented that the Clean Water Act is not a mechanism for demanding flow, it is a mechanism for dealing with temperature and other measures. Dealing with these measures can result in incidental flow effect. The agreement was designed to take these issues into account.

Mr. James Tucker, Idaho Power Company, spoke to the committee regarding the company's role in this issue. He stated that Idaho Power has been engaged in the Snake River Basin Adjudication mediation process since it began. The company withdrew from the process due to timing and due to a concern that the issues that relate to the Hells Canyon Complex could not be adequately addressed in this context. This was primarily because of the parties that were not at the table.

There have been discussions, in the context of ESA consultation of Hells Canyon, relative to downstream temperature issues. There is a debate between Idaho Power Company and downstream interests as to the cause or effects on the Canyon and the cause and effects the Lower Snake Dams have on temperature in the Lower Snake River. Idaho Power expects these discussions to continue. **Mr. Tucker** said that in some way these talks are related to this agreement because temperature is viewed as a necessary component for flows as they move down the river.

Senator Noh asked what the time frame was on the consultation for temperature and relicensing and whether the company is looking at a biological opinion rather than relicensing. **Mr. Tucker** said the company will have a biological opinion done on the new licensing of the Hells Canyon Complex for the ESA consultation. The current license term ends in July 2005. It is unlikely this process will be completed by that time so annual licenses will be issued for the Canyon until the new license is issued. This new license could be issued at any time after NEPA compliance and ESA consultation is concluded. FERC will issue the license and they have estimated that the new license may be issued by fall of 2006. This could be optimistic.

Senator Burtenshaw asked whether the agreement affects Idaho Power's water rights. **Mr. Tucker** stated that he did not envision any of the company's water rights being affected by the agreement. This agreement is intended to deal with project issues relative to the depletionary effect of the upstream Bureau of Reclamation projects. The flow rights for the company on the river should not be affected. **Mr. Tucker,** in response to another question from **Senator Burtenshaw,** stated that the company could gain more water coming down the river but they would not gain more water rights.

Senator Andreason asked whether the agreement could affect the company's ability to produce power in Hells Canyon. **Mr. Tucker** stated that they have concerns with the

overall ESA processes that are taking place on the entire river. He added that to the extent ESA considerations in the agreement implicate the Snake River upstream, it may have some effect on Idaho Power Company. Idaho Power will be watching that closely and will participate in those issues in order to ensure that interests are protected.

Senator Noh commented that there seems to be a large knowledge gap in the state regarding the agreement. He asked the committee for ideas on how to educate the public. **Representative Raybould** suggested reviewing the minutes of this meeting and using important segments to prepare a type of information sheet to distribute around the state. He stated this would have to be reviewed by the Attorney General's Office and the Governor's Office before distribution. Other suggestions included press releases, news conferences and announcements at the working group meetings. Education of the public, many of whom do not know this issue involves them, is very important. **Representative Wood** volunteered to provide information to the press in her area and suggested that other legislators do the same. **Senator Burtenshaw** commented that, in his opinion, it is very important that the Lemhi /Salmon area hold a town meeting to inform the citizens and to let them know that they are being represented in these negotiations. **Mr. Bogert** said that a copy of the agreement/term sheet is on the Internet at the Governor's website http://www2.state.id.us/gov/issues/srba.htm. He added that representatives from the Governor's Office would be more than willing to attend town hall meetings to help educate the public. **Mr. Strong** suggested including the Association of Idaho Cities in the education process because the water supply for cities needs to be addressed.

The meeting was adjourned at 3:40 p.m.